Public Prosecutor v Nasruddin

HIGH COURT (SHAH ALAM) — CRIMINAL TRIAL NO 45–80 OF 2003
KN SEGARA J
7 MARCH 2007

Criminal Law — Dangerous Drugs — Trafficking — Whether accused was an innocent carrier — Whether accused was a drug addict — Whether drugs were for accused's own consumption — Dangerous Drugs Act 1952 ss 2, 37(d), 39B(1)(a)

The accused was charged for trafficking in 11,544.7g of cannabis within the compound of Masjid Amanah, Batu Caves, Selayang under s 39B(1)(a) of the Dangerous Drugs Act 1952 ('DDA'). Acting on information received on 19 April 2000, a party of police went to the vicinity of the mosque. They saw the accused approach the mosque at about 9.15pm and followed the accused into the precinct of the mosque where they arrested him. When the police searched the bag that the accused was carrying they found a large cardboard box which contained several large lumps wrapped in various coloured plastic and newspaper sheets. These were analysed and found to be cannabis. In his defence, the accused stated that he was merely an innocent errand boy, carrying the parcel for his employer, which he stated he did not know.

Held, finding the accused guilty as charged:

The quantity of cannabis was very large and the accused had not raised a defence that the drug was for his consumption. With such a large quantity in his possession, it was impossible for him to convince the court that it was indeed for himself, without evidence that he was a drug addict. The accused had not discharged the burden to rebut, on a balance of probabilities, the presumptions invoked under s 37(d) DDA. The prosecution had proved beyond reasonable doubt that the accused was in possession of 11,544.7g of cannabis at the date and time stated in the charge. Taking into consideration the large quantity of the drug involved, the manner it was packaged and carried by accused, coupled with the irresistible inference that he was obviously going to deliver and part with the same to some third party. 'Trafficking' within the meaning of s 2 DDA and the context of s 39B had also been proved by the prosecution, beyond reasonable doubt (see paras 23–24).

[Bahasa Malaysia summary

Tertuduh telah dituduh mengedar 11,544.7g kanabis dalam kawasan Masjid Amanah, Batu Caves, Selayang di bawah s 39B(1)(a) Akta Dadah Berbahaya 1952 ('ADB'). Bertindak atas maklumat yang diterima pada 19 April 2000, sepasukan polis telah ke kawasan masjid tersebut. Mereka melihat tertuduh menuju ke masjid itu

lebih kurang pukul 9.15 malam dan telah mengikuti tertuduh ke dalam kawasan masjid itu di mana mereka telah menangkapnya. Apabila polis mencari beg yang tertuduh telah bawa mereka menemui satu kotak kdbod besar yang mengandungi beberapa ketul besar yang dibalut dengan plastik berwarna dan helaian akhbar. Ia telah dianalisa dan didapati adalah kanabis. Dalam pembelaannya, tertuduh menyatakan bahawa beliau hanya budak penghantar yang tidak bersalah, yang telah membawa bungkusan untuk majikannya, yang beliau nyatakan tidak mengenalinya.

Diputuskan, mendapati tertuduh bersalah seperti dituduh:

Kuantiti kanabis tersebut adalah besar dan tertuduh tidak menimbulkan pembelaan bahawa dadah tersebut adalah untuk kegunaannya. Dengan kuantiti yang besar dalam milikannya, adalah mustahil untuknya meyakinkan mahkamah bahawa dadah tersebut hanyalah untuk dirinya, tanpa keterangan bahawa beliau seorang penagih dadah. Tertuduh tidak melepaskan beban bukti untuk mematahkan, atas imbangan kebarangkalian, andaian yang digunakan di bawah s 37(d) ADB. Pihak pendawaan telah membuktikan melampaui keraguan munasabah bahawa tertuduh mempunyai milikan 11,544.7g kanabis pada tarikh dan masa yang dinyatakan dalam pertuduhan. Setelah mengambilkira kuantiti besar dadah yang terlibat, cara ia dibungkus dan dibawa oleh tertuduh, tambahan pula dengan inferens nyata yang beliau dengan jelas akan menyerahkan dadah itu kepada pihak ketiga. 'Pengedaran' dalam maksud s 2 ADB dan konteks s 39B juga telah dibuktikan oleh pihak pendakwaan, melampaui keraguan munasabah (lihat perenggan 23–24).]

Notes

For cases on trafficking, see 4 *Mallal's Digest* (4th Ed, 2005 Reissue) paras 320–446.

Legislation referred to

Dangerous Drugs Act 1952 ss 2, 37(d), 39B(1)(a), 39B(2)

Wan Shaharuddin bin Wan Ladin (Deputy Public Prosecutor, Attorney General's Chambers) for the prosecution.

Tn Hj Zamani bin Ibrahim (Zamani Ibrahim Tarmizan & Co) for the accused.

KN Segara JCA (now JCA):

[1] The accused, an Indonesian, from Acheh, was charged for trafficking in 11,544.7g of cannabis on 19 April 2000 at about 9.15pm within the compound of the mosque known as Masjid Amaniah, Batu Caves, Selayang, an offence under s 39B(1)(a) Dangerous Drugs Act 1952 ('DDA'). The prosecution called five witnesses to prove its case and, upon the defence being called after the close of the case for the prosecution, the accused elected to give evidence on oath but did not call any witnesses to support the defence. At the conclusion of the trial, the accused was found guilty of the offence as charged, convicted and sentenced to death.

[2] The case for the prosecution is briefly as follows:

[3] Acting on information received, at about 7pm on 19 April 2000, ASP Giam Kar Hoon ('SP3') led a party of police to the vicinity of the mosque. The police party was not in police uniform. Upon arriving within the area of the mosque, SP3 assigned the respective members of his team positions to be taken in the vicinity, for the purposes of observing any drug trafficking activity, and arrest of suspect/s, thereafter. They had walkie-talkies for communication with each other.

[4] SP3 and S/M Abdullah were in an unmarked police car parked along the road, at a distance of about 70ft from the main entrance gate of the mosque. They kept a lookout from their position, and at about 9.15pm, SP3 saw the accused crossing the road on foot, from the direction of a row of shops in front of the mosque, and proceeding towards the entrance of the main gate of the mosque, carrying a large bag on his right shoulder supported with his right hand. SP3, thereupon, informed his police personnel at their respective positions to be on the alert, while he got out from the car to follow the accused on foot, after instructing S/M Abdullah to drive the car and follow him, as he trailed the accused on foot into the precinct of the mosque, wearing the skull cap (ketayap) he had borrowed from S/M Abdullah.

[5] As SP3 got nearer the accused, within the fenced area of the mosque, and upon the beam of the car lights of the car, driven by S/M Abdullah, hit SP3 and the accused from behind, the accused turned his head to look behind him. At that moment, SP3 was about 10ft behind the accused. The accused, thereupon, dropped the bag on the road (within the fenced area of the mosque) and fled. SP3 called out 'Berhenti, Polis' and ran after him. SP3 kicked the leg of the accused and the accused fell down. A struggle ensued between the accused and SP3 in his attempt to arrest the accused, notwithstanding SP3 again identifying himself as a police. Eventually, SP3 arrested the accused, about 50ft away from where the accused dropped the bag he was carrying on his shoulder.

[6] SP3, then returned to the spot where the accused had dropped the bag he was carrying. SP3 found the bag to be a large plastic bag coloured in strips of red, yellow and green. The bag (exh P15) had a handle and a zip. The zip was damaged and the bag appeared opened.SP3 could see that inside the bag was a large cardboard box (exh P16) and the top portion was open. The contents of the box could be seen and there were several large lumps wrapped in chocolate coloured plastic and a sheet of newspaper.

[7] SP3 examined the contents of the cardboard box in the presence of the accused. He found, therein, four large lumps wrapped in yellowish-chocolate coloured plastic and 10 large lumps wrapped in clear plastic, together with a newspaper sheet.

[8] An Indonesian passport bearing the accused's photograph and name was recovered from him.

[9] SP3, suspecting that the accused had come to the mosque in a Proton Wira parked across the road opposite the mosque, bearing No NAU 3154, seized the car but eventually returned it to the owner. Under cross-examination he agreed that the accused did not tell him he had come to the area in the car NAU 3154.

[10] The 14 large lumps found in the cardboard box were analyzed by the chemist, Ismail bin Talib (SP2), to be cannabis, weighing 11,544.7g.

[11] The accused was called upon to enter his defence at the close of the prosecution's case as exhs P15 (the large plastic bag) and P16 (the large cardboard box, containing the 14 large lumps) were in the custody and control of the accused when he carried the bag on his shoulder from across the road into the mosque compound. In the circumstances, s 37(d) DDA was applicable, and further, the overt act of the accused carrying the large plastic bag on his shoulder, and walking across the road into the compound of the mosque opposite, is not passive possession but mens rea possession of the drugs. To be in possession of such a large quantity of drugs, and simultaneously to be carrying same on the shoulder from across the road into the precinct of the mosque, is most certainly prima facie evidence of 'trafficking' within the definition of 'trafficking' under s 2 DDA and the context of s 39B.

[12] The accused's defence, in a nut shell, was that on the date and time of the incident he was merely an innocent errand boy, seeking to earn RM50, to carry and deliver for his employer, as instructed.

[13] The accused testified that he came to Malaysia in 1997 in search of a living and did contract work as a labourer. He had no permanent job. He stayed in a rented room with three others at Kg Medan, Petaling Jaya.

[14] The accused admitted that on 19 April 2000 he was arrested in the vicinity of a mosque in Selayang. He testified that he went to the mosque from his place of work at Batu 6, Klang Lama in a van together with 2 other persons, that is, his employer (taukeh) and the driver of the van.

[15] He does not know the name of his employer or the number of the van. His employer paid him RM50 per day. The nature of the job offered by the employer daily is not specific.

[16] On 19 April 2000, when the accused was inside the van, his employer merely told him they were proceeding towards Selayang. When they reached Selayang, the van entered into the vicinity of the mosque area and the van was then parked in front of the mosque toilet. The employer did not get off the parked van but spoke on his hand-phone for about one and a half minutes. After that, the employer told the accused to get off the van and proceed to the main entrance gate of the mosque and look across the road for a Proton Wira. The accused testified that the employer instructed him to approach the Proton Wira and get a commodity ('barang') from a person inside the car.

[17] The accused testified he did as instructed. When he went up to the Proton Wira there was a male person seated at the driver's seat. That person instructed the accused to open the left rear door of the car and remove something that was packed in a large plastic bag and hand over same to the accused's employer, who was waiting in the van parked in front of the toilet, within the compounds of the mosque.

[18] The accused took the package and handed it over to his employer, who placed it inside the van. The accused and his employer then went to say their prayers in the mosque and when they were returning to the van, after their prayers, a few male persons rushed towards them from the direction of the main gate entrance to the mosque. The accused testified that his employer ran away, leaving him behind to be arrested, but, nevertheless, the employer, too, was arrested about 40 feet away from him.

[19] The accused testified that he and his employer were handcuffed and put into separate cars. He was taken to the parked van in front of the toilet and the package together with the plastic bag was removed from the van and placed on the ground in front of him. However, his employer who was also arrested with him, was not to be seen anywhere. He did not know where he was taken to after his arrest.

[20] At the close of the case for the defence, the court was left with two versions of the recovery of the 11,544.7g of cannabis, the subject matter of the charge. I have considered the evidence of the accused very carefully, in the light of the evidence of the prosecution. Upon the totality of the evidence before me, I reject the accused's evidence that he was driven to the mosque in a van by his employer and, thereafter, he was instructed by the said employer to collect the plastic bag from a person in a Proton Wira parked outside the precinct of the mosque. I also reject the accused's evidence that he then collected and delivered it to the said employer, who placed it inside the van, and from which van the plastic bag and package was recovered by the police. I find, on the evidence before me that the 'taukeh' ('employer') alluded to by the accused is a non-existent person, introduced to create an element of doubt that the accused had any 'mens rea possession' of the drugs. In the circumstances, I rule that the 'taukeh' is a figment of the imagination of the accused and the defence is nothing more than an afterthought.

[21] It is totally irrelevant to the finding of the accused's guilt or innocence that the court should determine his mode of transport before he was seen walking and crossing the road carrying on his right shoulder the large plastic bag.

[22] After considering the accused's defence, I have no reason to doubt SP3's evidence that the accused had carried the plastic bag from across the road on his shoulder and, thereafter, continued to do so right into the precinct of the mosque (with a view to part with his possession of the drugs, subsequently) but, upon realizing that he was being closely pursued by SP3, he immediately dropped the plastic bag, and attempted to flee to avoid arrest.

[23] The quantity of cannabis is very large. The accused has not raised a defence that the drug was for his own consumption. In any event, with such a large quantity in his possession, it would be almost impossible for him to convince this court that it was indeed for his own consumption, without an iota of evidence that he is a drug addict.

[24] The accused has not discharged the burden to rebut, on a balance of probabilities, the presumptions invoked under s 37(d) DDA. Therefore, the

prosecution has proved beyond reasonable doubt that the accused was in possession of 11,544.7g of cannabis at the date and time stated in the charge. In the upshot, and upon taking into consideration the large quantity of the drug involved, the manner it was packaged and carried by accused, coupled with the irresistible inference that he was obviously going to deliver and part with same to some third-party, known or unknown, 'trafficking', within the meaning of s 2 DDA and the context of s 39B, has also been proved by the prosecution, beyond reasonable doubt.

[25] The accused is found guilty as charged for the offence under s 39B(1)(a), convicted and sentenced to death under s 39B(2.

Accused guilty as charged.

Reported by Chew Phye Ken